1979

Edwin Gossner, Et Al. v. Utah Power & Light, A Utah Corporation and the State of Utah, By And Through Its Division of State Land : Brief of Plaintiffs-Appellants

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

EDWIN GOSSNER, et al,

Plaintiffs-Appellants,

vs.

Case No.

UTAH POWER & LIGHT, a Utah corporation; THE STATE OF UTAH, by and through its Division of State Lands,

Defendants-Respondents.

BRIEF OF PLAINTIFFS-APPELLANTS ON

APPEAL FROM THE JUDGMENT OF
JUDICIAL DISTRICT COURT OF
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DEFENDANTS-RESPONDENTS

IN THE SUPREME COURT OF THE STATE OF UTAH

EDWIN GOSSNER and JOSEPHINE GOSSNER, husband and wife; NORA BAIR; KEN BAIR as administrator of estate of Lloyd Bair; HOWARD K. BARLOW and DEL MARIE BARLOW, husband and wife; WILLIAM BECKSTEAD and ELVIRA BECKSTEAD, husband and wife; BLANCHE BINGHAM; RALPH BINGHAM and JANE BINGHAM, husband and wife; BARDO M. BODILY and WANDA BODILY, husband and wife; ALFRED CHAMBERS and MARTHA CHAMBERS, husband and wife; RUTH FERRIS as administrator of estate of G. Ferris Chambers; LENNIS CHAMBERS; OLEY LLOYD COLEY and VERDA COLEY, husband and wife; G. ELLIS DOTY; ROBERT W. GOODWIN and ELNER GOODWIN, husband and wife; THERON HANSEN and ORIS MAY HANSEN, husband and wife, NEFF HARDMAN; HEBER HARDMAN and SHIRLEY HARDMAN, husband and wife; VAN JENSEN and DOROTHY JENSEN, husband and wife; GAIL B. JENSEN and ISABEL JENSEN, husband and wife; NEIL JENSEN and CLARA JENSEN, husband and wife; ROSS LABRUM and LINDA LABRUM, husband and wife; DUANE LABRUM; ROSS LABRUM; LEE LABRUM; ARTHUR D. MAURER and GERALDINE MAURER, husband and wife; LaMAR C. NIELSEN, administrator of estates of Clayton and Beth Neilsen; STEVE BODILY; DON E. SPACKMAN and PAULINE SPACKMAN, husband and wife; HAROLD SPACKMAN and MILLIE SPACKMAN, husband and wife; LLOYD BUTTARS and VEANA BUTTARS, husband and wife; JAMES SPACKMAN and VELDA SPACKMAN, husband and wife; BOB SPACKMAN and LINDA SPACKMAN, husband and wife; LeROY SPACKMAN and MARY C. SPACKMAN, husband and wife; REX SPACKMAN and MILDRED SPACKMAN, husband and wife; ROSS SPACKMAN, individually, and as personal representative of the estate of Hyrum Spackman; VAUGHAN B. SPACKMAN and RUTH SPACKMAN, husband and wife; C. ROBERT TOOLSON and ELOISE TOOLSON, husband and wife; CALVA J. VAN DYKE and LaRELL VAN DYKE, husband and wife; ADELBERT WHEELER and HILDA WHEELER, husband and wife; LAMONTE WHEELER and NELDA J. WHEELER, husband and wife; RAY WHEELER and FLORENCE H. WHEELER, husband and wife; REGAN WHEELER and JONETTE WHEELER, husband and wife;

CASE NO. 16593

RUBY WHEELER TRUST; WALLACE W. WISER and BEATRICE WISER, husband and wife; DAVID WOOD and CONNIE WOOD, husband and wife; MICHAEL WOOD and RUTH WOOD, husband and wife; THOMAS WOOD and CHARLENE WOOD, husband and wife; ELMER WOOD and LEOLA WOOD, husband and wife; EDITH WOOD FARNSWORTH; WALTER WOOD and NEDRA S. WOOD, husband and wife; ROYDON STROBELT; DON SPACKMAN; MERLIN ANDREWS; CHARLIE WOOD and BETTY JO WOOD, husband and wife; THEADOR J. ZILLES and LILLIE ZILLES, husband and wife; RAY ZILLES and GLENDA ZILLES, husband and wife,

Plaintiffs-Appellants,

vs.

UTAH POWER & LIGHT, a Utah corporation; THE STATE OF UTAH, by and through its Division of State Lands,

Defendants-Repondents.

BRIEF OF PLAINTIFFS-APPELLANTS ON INTERLOCUTORY APPEAL

APPEAL FROM THE JUDGMENT OF THE FIRST JUDICIAL DISTRICT COURT OF CACHE COUNTY HONORABLE A. H. ELLETT, JUSTICE

TABLE OF CONTENTS

STATEMENT OF THE NATURE OF THE CASE 1

DISPOSITION IN THE LOWER COURT 1

RELIEF SOUGHT ON APPEAL 2

STATEMENT OF FACTS 3

ARGUMENT 4

Part I: The Statute of Limitations Issue 4

Part II: Utah Power is Estopped to Assert the Statute of Limitations 13

Part III: The Trial Court Order Errs in Ruling that the Kimball and Dietrich Decrees Establish no Liability of Utah Power and Light where the Discharge from Oneida Dam Does Not Exceed 5,500 cfs . . 14

Part IV: The Improper Dismissal of the Complaints of Plaintiffs Edwin and Josephine Gossner by Virtue of an Early Flood Easement 16

CONCLUSION 21

APPENDICES:

APPENDIX "A": ORDER APPEALED FROM (ORDER OF JUSTICE ELLETT OF JULY 3, 1979)

APPENDIX "B": AFFIDAVIT OF DR. JAMES MILLIGAN

APPENDIX "C": EXTRACTS FROM IDAHO DIETRICH DECREE

APPENDIX "D": EXTRACTS FROM UTAH KIMBALL DECREE

APPENDIX "E": KUNZ, et al v. UTAH POWER & LIGHT

CASES CITED

CARSON v. CITY OF SPRINGFIELD, 53 Mo. App. 289 12,13

CITY OF COLLINSVILLE v. SWISHER, 162 P.2d 324 (Ok. 1945) 10

CLAWSON v. GARRISON, 592 P.2d 117 (Kans. 1979) 9

GOWING v. McCANDLESS, 547 P.2d 338 (Kans. 1976) . . . 8

GRIFFITH v. UTAH POWER & LIGHT, 226 F.2d 661 (1955) 17,18,19

HAYES v. ST. LOUIS & SAN FRANCISCO RAILROAD CO., 162 SW 266 (Mo. 1914) 12

HENDERSON v. TALBOTT, 266 P.2d 273 (Kans. 1954). . . . 6, 7, 8

JOHNSON v. TWIN FALLS CANAL CO., 66 Idaho 660, 167 P.2d 834 (1946) 19

KUNZ, et al v. UTAH POWER & LIGHT, 526 F.2d 500 . . . 19,20

NELSON, et al v. ROBINSON, et al, 118 P.2d 350 (Cal. 1941) 11

SIMON v. NEISES, 395 P.2d 308 (Kans. 1964) 8

WOODLAND v. LYON, 298 P.2d 380 (1956) 9,10

IN THE SUPREME COURT OF THE STATE OF UTAH

EDWIN GOSSNER, et al, Plaintiffs-Appellants, vs. UTAH POWER & LIGHT, a Utah corporation; THE STATE OF UTAH, by and through its Division of State Lands, Defendants-Respondents	)	Case No. 16593

BRIEF OF PLAINTIFFS-APPELLANTS ON INTERLOCUTORY APPEAL

STATEMENT OF THE NATURE OF THE CASE

This is an action by 33 farmers against Utah Power & Light Company for damages to their crops, and for loss of farming profits during the years 1974 through 1979, the plaintiffs having incurred their damages by virtue of Utah Power & Light Company having managed the Bear River in such a way as to cause the river to overflow onto plaintiffs' lands.

DISPOSITION IN THE LOWER COURT

This is an interlocutory appeal taken prior to trial on the merits, the Court having conducted a pretrial conference and having ruled at that conference that he would exclude certain evidence and apply a certain commencement date of the statute of limitations, the propriety of which rulings the parties desire to have determined prior to trial on the merits.

RELIEF SOUGHT ON APPEAL

This is an appeal from an Order entered by the Trial Court under date of July 3, 1979, the appeal being limited to three issues. The Order appealed from is attached to this Brief as Appendix "A".

The three issues raised are as follows:

(1) The Trial Court's declared intent to utilize an improper date of commencement of statute of limitations.

(2) Error in the Court's declared intent to limit evidence of fault and causation in the following respects:

   (a) to deny introduction of testimony as to the effect of negligent operation of Oneida Dam, and

   (b) ruling that the Kimball and Dietrich Decrees permit a discharge of 5,500 cfs when, in fact, the Decrees limit the discharge of waters to those which can be contained in the "natural channel."

(3) The erroneous dismissal of plaintiffs Edwin Gossner and Josephine Gossner by virtue of flood easements.

Appellants seek an Order of the Supreme Court on remand to the Trial Court providing the following directions to the Trial Court:

(1) That the statute of limitations as to damage to crops commences at the time of each successive injury to the crops;

(2) That plaintiffs be permitted to present testimony as to the causative effect of the operation of the Oneida Dam (and the discharges therefrom) on the flooding which they have experienced.

(3) That the Court be directed that the Kimball and Dietrich Decrees permit discharges in the Cache

Valley section of the Bear River by Utah Power up to and not exceeding the capacity of the natural channel, and not up to the limit of 5,500 cfs, as erroneously determined by the Trial Court.

(4) That the dismissal of the claims of Edwin and Josephine Gossner on summary judgment be reversed, with directions to the Court to present the factual questions of:

(a) increase of the burden of the flood easement; and

(b) negligent abuse of the flood easement

to the jury.

STATEMENT OF FACTS

The plaintiffs consist of 33 farmers having a claim against Utah Power & Light Company for the flooding of their farms along the Bear River in the years 1974 through 1979.

The claims are limited to damage to crops and damages for inability to plant crops, and do not contain any claims for damage to the land itself, the plaintiffs' claims totalling over $540,000.

All of the farms are located downstream of the Oneida Dam in Idaho and upstream of the Cutler Dam and Reservoir near Logan, Utah.

The record establishes that the flooding of the plaintiffs' lands is caused primarily by two factors (see Affidavit of Dr. James Milligan attached to this Brief as Appendix "B", R. 1187):

(1) The building up of sediment in the riverbed, decreasing the flow-carrying capacity of the channel caused by the following:

(a) the backwater effect of the Cutler Reservoir, and

(b) the fact that the presence of both the Oneida and Cutler Dams substantially decreases the

normal "scouring out" of sediment buildup which would occur each spring during the flood season if the dams were not present.

(2) The discharge of waters from Oneida Dam at volumes and time-durations which result in discharge of more water than the natural channel of the river can carry, thus causing the excess waters to flood out onto the farmlands.

Plaintiffs filed the action in the fall of 1976 for damages to their crops, going back three years under the three-year statute for the years 1974, 1975 and 1976. Additionally, they claim damages for the succeeding years of 1977, 1978 and 1979.

Since the filing of the Complaint, Utah Power & Light has modified its operation of the system to prevent most of the flooding, but for each of the latter three years the plaintiffs, in an effort to determine whether or not they could justify planting their lands, served interrogatories on Utah Power inquiring as to whether or not they could anticipate flooding, which interrogatories the Power Company has consistently failed to answer in a manner which would justify the farmers planting their lands.

Accordingly, for the latter three years, some farmers have damages for loss of profits on crops which were actually planted and flooded, or grasses which were flooded, whereas various others did not plant for fear of losing their entire crops as they had in the years immediately preceding.

ARGUMENT

PART I: THE STATUTE OF LIMITATIONS ISSUE

Paragraph (3) of the Order incorrectly provides that the Court will rule that the statute of limitations commenced at the first date the plaintiffs were flooded, rather than

adopting the proper rule which is that each time a new trespass is committed damaging crops, the statute as to that damage commences at the time of the flooding, the Order stating:

> "The Court holds as a matter of law that the three year statute of limitations (which is applicable to plaintiffs' claims) began to run from the date when the channel of the Bear River was filled with silt (caused by the erection of the Cutler Dam) so as to cause flooding of the adjacent farm land of plaintiffs."

Utah law requires that in order to gain a prescriptive easement on another party's land, one must make open, notorious, hostile use of that land for a period of 20 consecutive years.

The effect of the Trial Court's ruling is to reduce the period for gaining a prescriptive right to three years.

The fact is that there has never been a period of 20 consecutive years when the farmers were flooded. In fact, there has been virtually no flooding for the last three years (1977 through 1979).

The Affidavit of Dr. Milligan (Appendix "B" hereto) states:

> ". . . Utah Power & Light could have managed the discharges at Oneida Dam in a manner to prevent flooding of the plaintiffs' farms during the crop season had it chosen to do so."

The jugular vein of the issue of when the statute of limitations commences to run is the determination of whether or not the cause of the flooding is permanent and must occur every year that the dams stand in place, or, rather, whether it is what is termed in the case law as "abatable" or "continuous", the word "continuous" meaning in the context of these cases something which recurs but does not, of necessity, have to recur.

No tortuous twisting of the facts can disguise the abatability of the flooding in the face of the documented historic abatement. FLOODING, RESULTING FROM THE NEGLIGENT OPERATION OF A DAM SYSTEM, IS AN ABATABLE, AND NOT A PERMANENT, CAUSE OF INJURY.

The question of when a cause of action based on injuries to property by flowage, diversion or obstruction of waters accrues where the flooding is the direct and proximate result of the negligent operation of the dam system and not the result of the naked existence of the dam has never been expressly decided by a court of appellate jurisdiction in the state of Utah.

Numerous cases, arising in the various jurisdictions, make it clear that if, and when, Utah does decide this questi Utah will follow the clear majority in holding that flooding resulting from the negligent operation of the dam, as opposed to flooding resulting from design characteristics inherent in the construction of the dam, is abatable, and as such, a new cause of action arises with each fresh injury.

A line of cases, decided by the Supreme Court of Kansas, illustrate dramatically that force of logic compels the conclusion that injuries to property resulting from flooding which could have been prevented by the defendant short of the destruction of his dam system are abatable, and will support a new cause of action for each injury.

In HENDERSON v. TALBOTT, 266 P.2d 273 (Kans. 1954), the Court held that where water was impounded on the plaintiff's land which ebbed and flowed, depending upon the season of the year and the amount of rainfall, the plaintiff's injuries were temporary, not permanent, and each injury caused a new cause of action to accrue and the statute of limitations began to run anew from the date of each injury. The Court stated:

"We are convinced the rules, established by the great weight of authority and recognized and applied by our better reasoned decision, governing and decisive of such question as well as the question whether the flooding of land gives rise to a single right or successive rights of action are those succinctly set forth and stated in 56 Am. Jur., Waters 529 § 45:

> "' * * * In actions by riparian owners for damages for interference with the flow of a stream, the scope of recovery is usually held to depend on whether the injury is permanent or continuing. The weight of authority is to the effect that whenever the structure of obstruction impeding the flow of water is of a permanent character, and its construction and continuance are necessarily an injury, the damage is considered original, to be recovered in one action, and not continuous in character, and the statute of limitations begins to run from the completion of the obstruction, or at least from the time of the first injury. But when the construction of the structure are not necessarily injuries, but may or may not be so, the injury to be compensated in the suit is only the damage which has happened; and there may be as many successive recoveries as there are successive injuries. In such cases the statute of limitations begins to run from the happening of the injury complained of.'" (Emphasis supplied)

The HENDERSON case goes on to quote 56 Am. Jur. Waters 858, 859, § 443 as follows:

> "'* * *But if the overflow is merely temporary, occasional, or temporary, causing no permanent injury to the land, or if the situation involves other elements of uncertainty, such as the possibility or unlikelihood of the alteration or abatement of the causative conditions, or uncertainty in regard to the future use or improvement of the land, so as to prevent a reasonably accurate estimate of future damages, it is generally held that each repetition of the overflow gives rise to a new cause of action for which successive actions may be brought.'"

This is precisely the situation with which the Court is confronted herein. To digress from the line of Kansas cases briefly, if the cause of action of the plaintiffs

accrued but one time at the construction of the dam, or in the alternative, at the time of the first injury, and the plaintiffs had gone into court and asked for damages, includi damages for the injuries that are the basis of the instant lawsuit, how should the Court have responded to the argument of Utah Power that its operation of its dam system was abatable, and would be abated, and that, therefore, no future injuries were provable?

This hypothetical situation, while purely speculative, shows the absurdity of Utah Power's suggestion to the Court that the statute of limitations commenced upon the first injury applied to all subsequent injuries.

In SIMON v. NEISES, 395 P.2d 308 (Kansas 1964), the Kansas Court again had occasion to consider the applicability of the statute of limitations through an action involving damage to land. After reiterating its subscription to the authorities cited in support of its opinion in HENDERSON v. TALBOTT, the Court went on to say:

> "* * * that where the injury or wrong is classified by the courts not as original or permanent, but as temporary, transient, recurring, continuing or consequential in nature, it has been held that the limitation period starts to run only when the plaintiffs' land or crops are actually harmed by overflow, and that, for the purpose of the statute of limitations, each injury causes a new cause of action to accrue, at least until the injury becomes permanent."

In GOWING v. McCANDLESS, 547 P.2d 338 (Kans. 1976) the Court, after reiterating the rule laid down in the two previ cited cases, held that the plaintiffs were seeking to recover temporary damages arising from the maintenance of obstructio in the watercourse on defendant's land, and limited the recovery they sought to damages to their crop, sustained wit the statutory period prior to the filing of their petition, the plaintiffs' cause of action was not barred by the statut of limitations. The Court, in GOWING, after noting that the

obstructions which caused the flooding were not "permanent" because they could be removed from the drainage ditch (as well as the fact that they were not "permanent" in the legal sense because they were not approved by the state), found that the plaintiffs' cause of action was not barred by the statute of limitations.

Here, again, the Kansas Court seized upon the crucial distinction between a permanent cause of flooding produced by the inherent and unmodifiable design characteristics, such as lawfully placed dams and bridges, as opposed to temporary causes such as the buildup of silt or the negligent operation of what would otherwise be a permanent improvement.

The line of Kansas cases referred to herein is concluded by CLAWSON v. GARRISON, 592 P.2d 117 (Kans. 1979). The holding in CLAWSON makes clear the underlying basis of the adoption of the rule set out in the previously cited cases. The CLAWSON Court states:

> "Flooding is an infrequent and virtually unpredictable occurrence. The amount of both present and future damages to defendant could not reasonably be determined in a single action."

(The flooding being referred to was produced by an upper landowner's leveling of land reducing its capability to retain surface water.)

Other states have announced rules for determining the accrual of a cause of action which are substantially the same as that followed by the Kansas Court. The Supreme Court of Idaho in WOODLAND v. LYON, 298 P.2d 380 (1956), was called upon to determine whether a continuing diversion of water from a watercourse to the injury of the downstream landowner was a single wrong or a continuing one. The Idaho Court stated:

> "The tort herein alleged is not a single wrong, but a continuing one, and appellant may, if the evidence supports his claim, recover for all injuries occurring

within the statutory period, even though the obstruction occurred more than four years before the complaint was filed."

The Supreme Court of Oklahoma, in CITY OF COLLINSVILLE v. SWISHER, 162 P.2d 324 (1945), decided a case which is particularly analogous to the case before the Court. In that case, the city had constructed a pipeline at such levels that when the water rose to a certain point in the river it was forced through the pipeline into the reservoir. Somewhere along the line a manhole was constructed to accommodate a cutoff valve, which the city neglected to keep closed, and through this valve and manhole water ran out upon plaintiff's land overflowing, and some of the water remained on the land until the water in the river lowered to where the water stand on the plaintiff's land could recede back through the pipe into the river.

The evidence showed that the land would not have overflowed but for the pipeline and the negligent maintenance and operation of the cutoff valve through which the water flowed upon plaintiff's land. The Court stated:

"Under the foregoing authorities the limitation is set in motion to the action for damages for such injuries as were the natural and obvious result of the erection of the permanent improvements at the time of the completion thereof, but this rule does not apply to such other injuries as subsequently resulted from the negligent maintenance or operation of the improvements, and the limitation as to the latter is set in motion at the time such injuries occur."

That is precisely the situation with which the Court is herein confronted. The plaintiffs do not claim that the erection of the dam in and of itself caused them harm. The existence of the dam, the only "permanent" aspect of the setting of this case, is not alleged by the plaintiffs to necessarily cause injury. It is, rather, the operation of the system by Utah Power that is causing the injury. Altho the erection of Cutler Dam is permanent and does cause the

sediment buildup in the river channel due to the backwater effect, Utah Power has the option of either dredging the channel or decreasing its flow of water from Oneida. All irrigation districts have to clean their canals from time to time, and we know of no special law which gives Utah Power license to clog up its channel and then proceed to use the farmers' lands as a substitute for that channel. This distinction is obvious. It is the same distinction pointed up by the popular bumper sticker that reads "Guns don't kill people, people kill people."

Finally, the Court, in NELSON, et al, v. ROBINSON, et al, 118 P.2d 350 (Cal. 1941), states the general rule governing actions of this character:

> "The courts of this state have repeatedly held that one who permits water to percolate from his artificial canal to the property of his adjoining neighbor commits an invasion of the latter's rights for which redress is obtainable in damages, by injunction or through the abatement of a nuisance." (Emphasis supplied)

While the Court is confronted with flooding produced by the negligent operation of a dam system, as opposed to percolating waters resulting from an artificial canal, the principle is the same.

The Court, in NELSON, makes a statement which is not only incisive but illustrates the folly of Utah Power's assertion that only one cause of action has accrued in this case, which cause of action is barred by the statute of limitations. The Court states:

> "No one should be permitted to acquire a prescriptive right to continue a negligent act. We therefore hold that appellants are entitled to recover for any injury to their lands which was inflicted within three years prior to the commencement of the action."

Clearly, the Court would reach an anomalous result if it were to hold, as Utah Power has requested, that a single

cause of action accrued many years ago which is not blocked by the statute of limitations. If it were to so hold, the Court would have decided that in three years Utah Power could gain a prescriptive right to continue its negligent acts, whereas Utah law requires twenty years to gain a prescriptive easement.

In its briefing in the Trial Court, Utah Power misled the Court citing HAYES v. ST. LOUIS AND SAN FRANCISCO RAILROAD CO., 162 SW 266 (Mo. 1914), for the proposition that where a dam is completely built and therefore permanent, the statute of limitations commences when the dam first causes flooding. Anticipating that that case may be relied upon again by Utah Power, we invite the Court's attention to the fact that the Court, in HAYES, defined the determining factor to be whether or not the injury is necessarily a permanent injury as opposed to the other type of injury which is variously termed by the Courts to be continuous or abatable. The rule of law applicable to the instant case is stated twice at page 268 of the Southwestern Reporter:

> ". . . but where the nuisance is of a continuing (abatable) nature, each continuance gives rise to a new cause of action, and successive actions may be maintained for the damages accruing from time to time.
>
> ". . .Nuisances consisting of acts done, or particular uses of property, may be properly termed 'continuing' when they are such a character that they may continue indefinitely, or, on the other hand, may be discontinued at any time." (Emphasis supplied)

The fact that Utah Power was able to stop the flooding during the last three years is, at least, prima facie evidence that the injury is abatable and subject to discontinuation rather than permanent.

The Court, in HAYES, quotes with approval from CARSON v. CITY OF SPRINGFIELD, 53 Mo. App. 289, the following language

". . .When the nuisance or cause of the injury may be removed or remedied at any time, the measure of damages is the actual damage sustained up to the date of the institution of the suit. Damages accruing subsequently must be recovered in successive actions."

That, of course, is the situation here. The historical abatement illustrates this.

PART II. UTAH POWER IS ESTOPPED TO ASSERT THE STATUTE OF LIMITATIONS

Should the Supreme Court disagree with the position of the farmers on the date of commencement of the statute of limitations, then, in that event, the remand should direct the Trial Court to permit the presentation of testimony to the jury on the issue that the Utah Power & Light Company is estopped to assert the statute of limitations defense.

The reply of the plaintiffs to the Answer and Counterclaim of Utah Power contains a Motion to Strike the Fourth Affirmative Defense of Utah Power, as set forth in an Amendment to the Reply reading as follows (R. 1183):

"COME NOW the plaintiffs and move the court for an order amending their Reply to the Answer of Utah Power and Light by adding a Motion to Strike as follows:

"'To strike the Fourth Affirmative Defense to the effect that the claim of plaintiffs is barred by the statute of limitations upon the ground that Utah Power is estopped to assert said defense by virtue of having in numerous meetings with plaintiffs:

"'(a) denied that its facilities caused the flooding; and

"'(b) provided plaintiffs with engineering studies over the years allegedly demonstrating Utah Power's non-responsibility.'"

The depositions of the various plaintiffs establish that they had numerous meetings with Utah Power officials since 1948, in which Utah Power denied that its facilities or its

mode of operation of the facilities was causing the flooding. Certainly, in face of those affirmative representations to the plaintiffs by Utah Power which were given for the purpose of forestalling lawsuits (and did have that effect), Utah Power is estopped from now raising the statute of limitations. This, of course, is a factual matter which must be determined upon the evidence at trial, and we simply ask that the remand require that the Trial Court allow evidence to be presented on this issue.

There is a further aspect to the statute of limitations question, and that is the fact that most jurisdictions provide that a statute of limitations does not commence to run until a person knew, or should have known, of the cause of his injury. In the instant case Utah Power is denying that its facilities and its operation of its facilities are the cause of any flooding on plaintiffs' lands, and since Utah Power makes such denial, certainly it is estopped from asserting that plaintiffs "knew, or should have known," of Utah Power's culpability at some earlier date.

The fact is that the plaintiffs procured a preliminary engineering study in 1976 and filed suit that same year, and it was not until final engineering work was completed by Dr. Milligan in preparation for trial in 1979, that the plaintiffs actually had solid proof that Utah Power is responsible for the flooding.

PART III. THE TRIAL COURT ORDER ERRS IN RULING THAT THE KIMBALL AND DIETRICH DECREES ESTABLISH NO LIABILITY OF UTAH POWER AND LIGHT WHERE THE DISCHARGE FROM ONEIDA DAM DOES NOT EXCEED 5,500 CFS.

The Order reads, in part, as follows under Section (2) thereof (Appendix "A" hereto):

> "The Court further rules as a matter of law that with regard to the release of waters the standard of care imposed upon the defendant is established by the Kimball

and Dietrich decrees, and inasmuch as it is stipulated that such releases have never exceeded 5,500 cfs, there is no liability of the defendant either in absolute liability or in negligence because of release of water from Oneida Dam."

We have appended the pertinent parts of the Idaho Deitrich Decree to this Brief as Appendix "C", and the pertinent parts of the Kimball Decree as Appendix "D".

The Dietrich Decree is from a federal district court case in Idaho, wherein Utah Power & Light was granted the authority to collect and impound the waters during flood season at Stewart Dam near Bear Lake up to a maximum water right of 5,500 cfs.

At no point in the Dietrich Decree did the Court give the right to discharge waters at that level in the Cache Valley, the Dietrich Decree stating at page 8:

". . . and the waters released by it from storage may be conveyed through the NATURAL CHANNEL of the river. . ."

(Note the Decree states "natural channel" not entire flood plain.)

The Kimball Decree incorporated the Idaho Dietrich Decree by reference, and then, with respect to the right of Utah Power to discharge waters, the Decree stated at page 6:

"After passing said state line such released stored waters may be conveyed through that part of the natural channel of said river covered by this Decree. ."

There is in this record an Affidavit of plaintiffs' engineer, Dr. James Milligan, (App. "B" hereto) stating specifically:

". . .(1) The natural channel of the Bear River at various points between Oneida Dam and Cutler Reservoir, and in particular the areas at or near the farms of the plaintiffs, will overflow its banks when the river contains a flow of approximately 3,400 cfs."

Thus, the Trial Court is clearly in error in its use of the 5,500 cfs figure, and unless the Supreme Court corrects that error on this interlocutory appeal the plaintiffs will not even have an opportunity to present this liability issue -- at best, the question is a factual question and not a matter of law.

The evidence through the depositions establishes that the right to collect 5,500 cfs up in Idaho at the Stewart Dam is a collection of waters at flood stage. Historically there have never been discharges during the crop season, and certainly not in July, August and September, of flows of 5,500 cfs in the Cache Valley.

It should further be noted that both the Kimball and Dietrich actions were actions for determinations of water rights and were not actions to condemn land for flood easements. Both Decrees granted Utah Power and Light the right to collect 5,500 cfs above Bear Lake and store that water in Bear Lake, and both Decrees provided that the discharge of that water would be through the natural channel and not over the whole flood plain, including the farms of all of the farmers from Bear Lake to Salt Lake. It is important that this error be corrected on the remand so that proper evidence can be presented to the jury, particularly on the issue that the discharges at Oneida under the control of Utah Power during the years of the flooding have been due to their negligent operation of the Oneida discharge levels in derogation of the rights of the plaintiff farmers.

PART IV. THE IMPROPER DISMISSAL OF THE COMPLAINTS OF PLAINTIFFS EDWIN AND JOSEPHINE GOSSNER BY VIRTUE OF AN EARLY FLOOD EASEMENT.

The Trial Court Order of July 3, 1979 rules as follows with respect to the Summary Judgment against Edwin and Josephine Gossner:

". . . It is further ordered that the Motion for Summary Judgment dismissing with prejudice the complaint of the plaintiffs Edwin Gossner and Josephine Gossner, on the ground that they and their predecessors have heretofore conveyed flood easements to Utah Power and Light be and hereby is granted."

The issue whether or not an easement has been negligently abused or whether the burden on the easement has been wrongfully increased is a jury question.

Utah Power has filed as a "Third Claim for Relief" commencing at page 4 of its Amended Answer and Counterclaim, a defense as to the plaintiff, Ed Gossner, that the power company holds a flood easement on his land and that, therefore, his claim is not proper and that, additionally, he is liable for attorney's fees and court costs for participating in this action.

The fact is that the Gossner Flood Easement was executed on the then existing type of operation of the river in 1953, and that operation has changed materially in recent years so that it is flooding more of Mr. Gossner's land at different and more inconvenient times than existed at the time the easement was taken. The law is, as established by a Ninth Circuit Court case involving Utah Power & Light, that such a flood easement is not a defense.

In GRIFFITH v. UTAH POWER & LIGHT CO. (1955), 226 F.2d 661, the Ninth Circuit Court held that even where the power company has a perpetual easement, still it may be held liable for damages caused by its wrongful or negligent flooding of the plaintiff.

In GRIFFITH, the Ninth Circuit Court overruled a dismissal granted by the District Judge on summary judgment, premised on the existence of the easements, the Court stating at page 668:

"Even if defendant had an absolute right, under the principle that one must not use even vested property in such a manner wrongfully or negligently to injure

another, there was a cause of action stated. This unquestionably made a genuine issue of material fact upon which plaintiffs were entitled to a jury. No matter how convenient it may have been for defendant or the trial court to have disposed of the whole case by finding the fact established by the uncontroverted affidavits of defendant, the ruling would have been error.

"The trial court was vested with no discretion. The Federal Constitution gives a right of jury trial in a contested issue in a law action. This right is positive and should not be whittled away by decision of contested issues by the judge at hearings in camera before trial. The summary judgment rule does not confer this power even in a nonjury case. The remedy can be invoked only when complete absence of genuine fact issue appears on the face of the record. Resort to summary judgment procedure is futile where there is any doubt as to whether there is a fact issue. . . All doubts upon the point must be resolved against the moving party. This Rule, on account of these limitations, was not intended to be used as a substitute for a regular trial of cases where 'there are disputed issues of fact upon which the outcome of the litigation depends.' This procedure is not, and of right ought not to be, a substitute for a trial by jury or judge. Plaintiffs had set up a claim of the negligence of defendant in respect to the release of water through their land. The defendant controverted the negligence. Even if the trial court believed there was no chance of recovery, he was bound to try out the issue thus contested. This is true even though the court may have believed some one issue was decisive."

In other words, the GRIFFITH case stands for the proposition that even if the power company has a right to flood lands under certain conditions, it can be held accountable in negligence if it unnecessarily and negligently does so.

The Court further held in GRIFFITH that a perpetual easement granted to a power and light company for flooding of lands in the operation of dams must be construed in the light of conditions prevailing at the time of its making, the Court stating at page 667:

". . . The parties, furthermore, must have construed the instrument in the light of the conditions prevailing at the time it was made." (Citing Hogan v. Blakney, 73 Idaho 274, 251 P.2d 209)

JOHNSON v. TWIN FALLS CANAL CO. (1946), 66 Idaho 660, 167 P.2d 834, holds that a grant of right to flood land does not carry with it the right to erode and destroy the land. In the JOHNSON case the water level contemplated at the time that the easements were acquired was a level of about eight feet, and the Court held the easements did not give the canal company the right to increase the water level to eleven feet and thus cause erosion to plaintiff's land.

Thus, under the rule of the GRIFFITH case and the JOHNSON case, it is a jury question as to whether the power company has improperly and negligently abused what easements it might have and as to whether, in light of the conditions prevailing at the time the easements were given, the company is liable for its actions.

Additionally, the Ninth Circuit Court of Appeals in the 1975 case brought by the Idaho farmers against Utah Power for flooding near Montpelier along the Bear River also contained two plaintiffs who had given flood easements to Utah Power. WAYNE KUNZ, et al, v. UTAH POWER & LIGHT, 526 F.2d 500.

Again, the KUNZ case is attached in full as Appendix "E" to this Brief, but we quote for the Court's convenience here the portion of the opinion at pages 504 and 505, 526 Fed. Rep., under headnote [10], the Federal Reporter reading as follows:

"[10] Utah Power held flood easements on the property of two of the landowners. The trial court asked the jury for separate verdicts for these two but instructed it that despite the easements Utah Power 'was not entitled to negligently flood those lands unnecessarily or to cause damage to those lands which reasonably could have been prevented.' Instruction 20. Utah Power

> contends that this charge was erroneous and that it should be exempt from liability for flood damage to land on which it held flood easements. We find this instruction to be consistent with the holding of this Court in Griffeth v. Utah Power & Light Co., 226 F.2d 661, 668-69 (9th Cir. 1955), which held the same defendant potentially liable for negligence in causing flood damage despite the existence of a flood easement."

The deposition of Ed Gossner in this case establishes that at the time he gave the flood easement, the Utah Power & Light representatives advised him that there would be no more flooding to be expected on his lands than he had been experiencing in previous years.

The representative further told him that he could conti to use his lands for farming purposes as he had in the past.

Mr. Gossner's deposition further establishes that up un about 1960 he was making excellent use of his bottomlands, i fact, getting two crops a year off of them by planting rye in the fall which would be harvested in the spring for silag and then planting on the same ground a corn crop which would be harvested later in the fall for silage -- in fact, it was his most valuable ground.

His deposition further establishes that commencing about 1960 the power company began to flood his lands to a greater and greater extent where, until finally in the 1970's, he wa unable to rely on planting any of it.

It is a jury question (and certainly not a matter of la to be determined before the evidence is in) as to whether th increased flooding on Gossner's land is due to negligence of Utah Power.

It is further a jury question as to whether Utah Power has increased the burden of the flooding beyond that which was contemplated by the parties when the easement was grante The deposition of Mr. Gossner sets up those disputed facts, and Mr. Gossner is entitled to have that question determine by the jury, with the granting of summary judgment being

improper where the record contains a dispute of substantial, material facts.

We therefore request that the remand provide that the action of the Court in granting the summary judgment dismissing Mr. Gossner's complaint be overruled, and that the Court be directed to present the issues to the jury.

CONCLUSION

It is respectfully submitted that the Order of the Trial Court as to the issues presented on this appeal be reversed, and that the remand provide:

(1) That the statute of limitations as to damage to crops commences at the time of each successive injury to the crops;

(2) That plaintiffs be permitted to present testimony as to the causative effect of the operation of the Oneida Dam (and the discharges therefrom) on the flooding which they have experienced.

(3) That the Court be directed that the Kimball and Dietrich Decrees permit discharges in the Cache Valley section of the Bear River by Utah Power up to and not exceeding the capacity of the natural channel, and not up to the limit of 5,500 cfs, as erroneously determined by the Trial Court.

(4) That the dismissal of the claims of Edwin and Josephine Gossner on summary judgment be reversed, with directions to the Court to present the factual questions of:

(a) increase of the burden of the flood easement; and

(b) negligent abuse of the flood easement

to the jury.

Respectfully submitted,
RACINE, HUNTLEY & OLSON

By _____
Robert C. Huntley, Jr.

HILLYARD, GUNNELL & LOW

By_____
Gordon J. Low

I HEREBY CERTIFY that two copies of the foregoing Brief were mailed to Albert J. Colton, 800 Continental Bank Buildi Salt Lake City, Utah, 84101, and to Richard L. Dewsnup, 301 Empire Building, 231 E. 4th South, Salt Lake City, Utah, 84 this 14 day of September, 1979, in envelopes with sufficie postage prepaid thereon.

_____
Robert C. Huntley, Jr.